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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MILTON G. PAREDES, Defendant and Appellant.	B190893 (Los Angeles County Super. Ct. No. BA290856)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol H. Rehm, Jr., Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Milton G. Paredes appeals from a judgment entered after a jury found him guilty of count 1, unlawfully taking or driving a vehicle (Veh. Code, § 10851), and count 2, receiving stolen property (Pen. Code, § 496).[1] We affirm.

CONTENTIONS

Appellant contends that: (1) he was denied the right to confront a witness because the trial court improperly admitted the witness's preliminary hearing testimony based on a finding that the People exercised due diligence in locating the witness; and (2) imposition of a concurrent term on count 2 violated the ban on multiple sentences for acts derived from the same course of criminal conduct.

FACTS AND PROCEDURAL HISTORY

Viewing the record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139), the evidence established the following.

On September 24, 2005, Oscar Nunez[2] operated a business that sold used appliances. At 1:00 p.m., Nunez noticed appellant drive up to his store in a blue van. Appellant and Norman Fillace began drinking in front of the store, and appellant began aggressively panhandling passersby. At 2:00 p.m., Nunez asked appellant to leave. Appellant drove away in the blue van, then returned to the store with Fillace at 3:00 p.m., and resumed drinking. Someone told Nunez that appellant had taken some tools from his store. Nunez confronted appellant at a nearby liquor store and reached into appellant's van to remove his keys and CD case to keep appellant there while Nunez called the police. Appellant kicked Nunez in the stomach twice and drove off with Fillace. Appellant then returned, and threw a screwdriver at Nunez, saying "here is your shit."

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Oscar Nunez also referred to himself as Alberto Nunez Murillo.

As Los Angeles Police Officer Tony Rodriguez and his partner, Officer Raymond Corrales, drove up to the store, they witnessed an argument between appellant and Nunez. After being read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, appellant told the officers that the van belonged to his father, who knew he was driving it. Appellant also stated that if the van was stolen, "the most that he could be charged with was driving without owner's consent." Officer Rodriguez started the van with a pocket knife. He testified that anything, such as a knife, can be used to start an older model Toyota van, where the lock has been broken or forced. He also found a screwdriver belonging to Nunez on the sidewalk near the van.

At trial, Nunez testified that two men were drinking in front of his store, and after he asked them to leave, they drove away in a blue van. He could not remember what the men looked like or telling the officers that appellant lived near him or threw a screwdriver at him. Dulce Sanchez-Castillo, a Los Angeles District Attorney investigator, testified that during an interview, she spoke with Nunez outside the presence of the police. Nunez told her he changed his story because he was frightened and he had a wife and children. Nunez was fidgety and nervous, and appeared to Sanchez-Castillo to be very scared. In the presence of the police, Nunez asserted that he could not remember anything.

At a pretrial hearing, the trial court granted the People's motion to declare Fillace an unavailable witness pursuant to Evidence Code section 240, and to admit his testimony from the preliminary hearing. Sanchez-Castillo testified that on the Friday preceding the trial date of Thursday, March 13, 2006, her partner began searching for Fillace. On March 12, 2006, Sanchez-Castillo visited Fillace's mother, who said she did not know Fillace's location, but she believed he was last in Texas. That same day, Sanchez-Castillo's partner, through searches of computer database information, visited Fillace's address in Palmdale, and was informed that Fillace had left for Texas in January. On March 12, 2006, Sanchez-Castillo spoke to an employee of the I.N.S., who searched his databases and informed her that Fillace was in custody on January 11, 2006, in Texas. Fillace had been ordered to self-deport to Guatemala, and to report to the

immigration court by March 6, 2006, on his self-deportation plans. He was to leave the United States by March 11, 2006. Fillace did not appear in immigration court on March 6, 2006. Sanchez-Castillo spoke to another I.N.S. officer on March 13, 2006, who gave her the same information. Sanchez-Castillo searched databases to determine if any warrants were out for Fillace's arrest.

Prior to contacting the I.N.S., Sanchez had no reason to believe that Fillace, who had been cooperative with the district attorney's office, would disappear. Fillace never indicated that he would become unavailable or uncooperative. He made his addresses available to the People. He testified at the preliminary hearing, and continued to make appearances as requested by the People, the latest on January 4, 2006. On that date, he was placed on call by the People.

At trial, Fillace's preliminary hearing testimony was read. Fillace had testified that appellant was the driver of the blue van; he accepted appellant's offer of a ride; Nunez was angry because he believed appellant had stolen his screwdriver; and Nunez took a CD set from the van, saying he would keep it until appellant returned his screwdriver.

The parties stipulated that Godofredo Garcia was the registered owner of the blue Toyota van in question; that he had locked the van on the evening of September 20, 2005; that he had not given anyone permission to drive his van; that he did not know appellant or have children of the same name; and that when he returned to his van later that evening, the van was missing.

Appellant testified in his own defense, admitting that he had stated to the police, "the worst thing that can happen here is they can arrest me for joyriding."

DISCUSSION

I. Whether the trial court properly determined that the People exercised due diligence in attempting to secure Fillace's presence at trial

Appellant contends that the People's efforts to locate Fillace were neither timely nor adequate. We disagree.

Former testimony from a prior proceeding is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness. (Evid. Code, § 1291.) A witness is unavailable if he or she is "absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240.)

"'[D]ue diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*People v. Cromer* (2001) 24 Cal.4th 889, 904.)

We review the trial court's determination of the historical facts, including the People's account of their failed efforts to locate the absent witness, under a deferential standard of review. (*People v. Cromer, supra,* 24 Cal.4th at p. 900.) We independently review the trial court's determination whether the People's efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial. (*Id.* at p. 901.) But, an appellate court will not reverse a trial court's determination simply because the defendant can conceive in hindsight of a proposed further step or avenue left unexplored. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) Nor can the court impose upon the People the burden of keeping continuous tabs on a witness, for the administrative burden would be prohibitive. (*Ibid.*)

We conclude that the People exercised due diligence in attempting to secure Fillace's presence at trial. (*People v. Diaz, supra,* 95 Cal.App.4th at pp. 706-707 [due diligence existed where police officer spoke to witness's mother; went to witness's schools; checked police records and hospitals; and attempted to personally serve subpoena on witness five times after start of trial, believing service before trial would have ensured her leaving area].) Here, Fillace had testified and appeared at court as requested by the People; he was cooperative; his addresses were legitimate; and he had last appeared in court on January 4, 2006, at which time he was placed on call. The People had no reason to suspect that Fillace would not show for trial. In attempting to

locate Fillace, the investigators searched databases, made personal visits to his mother's home and residence, and talked to I.N.S. officials after Fillace's mother told the investigator that he had an immigration issue. Accordingly, the People's attempt to contact him the week and day before trial was reasonably diligent.

Despite appellant's argument that trial counsel and the People knew on January 4, 2006, that Fillace had plans to visit Texas, we conclude that the People acted with reasonable diligence. This case is not like *People v. Cromer, supra*, 24 Cal.4th 889, cited by appellant. There, police knew that a witness had disappeared two weeks after a witness testified at a preliminary hearing, seven months before trial. The People issued subpoenas three months later, but did not serve them. The People's investigators visited the witness's residence a month before trial, but did not visit her mother's address until two days after receiving information that the witness was residing with her mother. Even though the People's investigators were informed that the mother was out but would return the next day, the investigators did not return to talk to her. Our Supreme Court concluded that "serious efforts to locate Culpepper were unreasonably delayed, and investigation of promising information was unreasonably curtailed." (*People v. Cromer, supra*, 24 Cal.4th at p. 904.) Here, on the other hand, Fillace was extremely cooperative with the People and had shown up to court at prior occasions; the People were not aware of any reason why he would not be available; the People attempted to locate him at known residences; and the People immediately followed up on leads when presented with them.

We conclude that the trial court did not err in admitting Fillace's preliminary hearing testimony. Even if the admission of the testimony was error, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence shows that Nunez had told officers that appellant was driving the blue van; appellant stated to officers that he could be arrested for joyriding, or driving without owner's consent; and despite appellant's statement that the van belonged to his father, the owner of the van denied knowing appellant or giving him permission to drive his van, which had been stolen.

II. Appellant's sentence imposed in count 2 was stayed by the trial court

Appellant urges that the concurrent term that the trial court imposed for the violation of section 496 should be stayed pursuant to section 654. But, both the reporter's transcript and the clerk's transcript indicate that the trial court imposed a two-year sentence with respect to count 2 and correctly stayed it. Accordingly, appellant's argument need not be further addressed.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST